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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

MAY 06 2005

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 97 192 50646

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based immigrant visa petition. Upon further review, the director determined that the petition had been approved in error. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The director certified the decision to the Administrative Appeals Office (AAO) for review. The AAO affirmed the director's decision, but subsequently reopened the matter in order to consider materials that had not been timely incorporated into the record. The AAO will again affirm the director's decision.

The petitioner is a Buddhist monastery. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a religious meditation teacher and author. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous membership in the religious denomination, or continuous work experience as a religious meditation teacher and author, immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established that the beneficiary possesses the necessary qualifications for the position offered.

The AAO, in its decision of February 1, 2005, reversed some of the above findings, but affirmed the director's findings with regard to the beneficiary's lack of continuous experience in the occupation.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*. The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 582.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

> (i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii) seeks to enter the United States--

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) before October 1, 2008, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III) before October 1, 2008, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

Regulations at 8 C.F.R. § 204.5(m)(3)(ii) require the petitioner to establish:

(A) That, immediately prior to the filing of the petition, the alien has the required two years of membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work; and

(B) That, if the alien is a minister, he or she has authorization to conduct religious worship and to perform other duties usually performed by authorized members of the clergy, including a detailed description of such authorized duties. In appropriate cases, the certificate of ordination or authorization may be requested; or

(C) That, if the alien is a religious professional, he or she has at least a United States baccalaureate or its foreign equivalent required for entry into the religious profession. In all professional cases, an official academic record showing that the alien has the required degree must be submitted; or

(D) That, if the alien is to work in another religious vocation or occupation, he or she is qualified in the religious vocation or occupation. Evidence of such qualifications may include, but need not be limited to, evidence establishing that the alien is a nun, monk, or religious brother, or that the type of work to be done relates to a traditional religious function.

The regulation at 8 C.F.R. § 204.5(m)(1) indicates that the "religious workers must have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition." 8 C.F.R. § 204.5(m)(3)(ii)(A) requires the petitioner to demonstrate that, immediately prior to the filing of the petition, the alien has the required two years of experience in the religious vocation, professional religious work, or other religious work. The petition was filed on July 9, 1997. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a religious meditation teacher and author throughout the two years immediately prior to that date.

As discussed in the AAO's previous decision, the petitioner has filed two special immigrant religious worker petitions on the beneficiary's behalf. The first of these petitions was filed on August 21, 1995, less than two

years before the second (present) petition. Thus, the petitioner's description of the beneficiary's duties submitted with the first petition amounts to a contemporaneous representation of those duties close to the beginning of the 1995-1997 qualifying period. As we have previously noted, materials submitted with that first petition in August 1995 refer to the beneficiary as a "monk" and a "minister."

In its February 1, 2005 decision, the AAO stated that the petitioner had not submitted any response to the director's certified notice of revocation. Subsequently, however, a brief dated October 18, 2004 has surfaced, which was not incorporated into the record until after the AAO had rendered its decision. We shall consider, here, counsel's arguments in that brief.

Counsel states: "The Director's decision refers in large part to another petition which is not part of the record in this proceeding. . . . [T]he 1995 petition . . . is completely separate and apart from the petition at issue here. It has no relevance to the present petition, and the contents of that petition are not of record in the present proceedings." Therefore, counsel asserts, "there are no inconsistencies in the record."

As counsel acknowledges, the evidence in question relates to another special immigrant petition filed on the beneficiary's behalf in 1995. This material is contained in the beneficiary's alien file, rather than in a physically separate record as is often the case with, for example, nonimmigrant petitions or asylum applications (more about which later). While the documents relating to the two petitions form two separate records of proceeding, the director was not prohibited from considering the evidence from the earlier record when considering the claims made in the newer record. On the contrary, we note regulations such as 8 C.F.R. § 103.2(b)(15), which specifically allows for consideration of materials from prior records of proceeding, stating that "the facts and circumstances surrounding the prior application or petition shall . . . be material to the new application or petition."

Furthermore, the petitioner filed the second petition on July 9, 1997. Because of the two-year continuous employment requirement, the beneficiary's activities from July 1995 to July 1997 are directly material to the outcome of the 1997 petition. The earlier petition had been filed on August 21, 1995, during this two-year qualifying period. Any representations made by the petitioner in August 1995 as to the nature of the beneficiary's work are, therefore, of the highest relevance to the outcome of the present petition. Counsel seems to argue that, when determining the vital question of what the beneficiary was doing in mid-1995, we are obliged to ignore claims and statements that the petitioner made to the director in mid-1995. We do not find this reasoning persuasive.

Having argued that "the 1995 petition . . . has no relevance to the present petition," counsel then argues that the approval of the 1995 petition remains in effect because it was revoked by a district office official rather than a service center adjudicator. The District Director, San Diego, issued the revocation notice on December 10, 1996.

Counsel observes that 8 C.F.R. § 205.2(a) limits revocation authority to "Any Service officer authorized to approve a petition under section 204 of the Act," and 8 C.F.R. § 204.5(b) states "Form I-140 or I-360 must be filed with the Service Center having jurisdiction over the intended place of employment, unless specifically designated for local filing by the Associate Commissioner for Examinations." Counsel states that these two clauses, taken together, demonstrate that only a Service Center may revoke a petition. The regulation at 8 C.F.R. § 204.5(b), however, specifies only where Form I-360 may be *filed*. Counsel cites no regulation that specifically limits where a Form I-360 petition may be *approved*, nor any regulation that more generally equates filing authority with approval authority.

Several months after the December 10, 1996 issuance of the revocation notice, a memorandum circulated indicating that "all petitions which are believed by field offices to have been incorrectly approved are to be returned to the approving center along with a memorandum of explanation." Memorandum from Paul W. Virtue, Acting Executive Associate Commissioner, Office of Programs, *Revocation of Employment-Based Petitions (I-140s)* (February 27, 1997). We note that this memorandum specifically applied only to I-140 petitions, whereas the current matter involves an I-360 petition (although it can certainly be argued that the same general principles apply to I-360 petitions). In any event, this memorandum did not exist on December 10, 1996, at which time local office revocations were accepted practice. Furthermore, the memorandum does not indicate or imply that past revocations by local offices are invalid.

As noted above, counsel now argues that the December 10, 1996 revocation is void because the district director had no authority to issue the revocation, and that "the inescapable conclusion must be that the petition is still in force." When considering this argument, we cannot ignore previous correspondence from the present attorney of record. On August 10, 1999, the Director, California Service Center, issued a new notice of intent to revoke relating to the 1995 petition. Counsel's response, dated September 7, 1999, reads, in part:

> We have received and read your notice of August 10, 1999 in which you propose to revoke the I-360 petition. . . .
>
> As you well know, this petition was revoked by the Service in a decision dated December 10, 1996. The decision was issued by the District Director and signed for him by [the] Deputy Assistant District Director, Examinations.
>
> We submit that you have no power or jurisdiction to try to revoke a petition which has already been revoked. There is, in effect, no petition to be revoked. Your proposed action is a nullity. . . .
>
> The petitioner objects strenuously to your proposed action because it is a useless act with no basis in the law or regulation.

The above statements amount, in effect, to an emphatic stipulation that the December 10, 1996 district office revocation was valid. The district director's revocation notice properly advised the petitioner of his appeal rights. Counsel's apparent change of heart, some five years after the above letter, is not sufficient grounds for reopening the 1995 petition or retracting its 1996 revocation.

More importantly, the matter currently under review is the revocation of the second petition, not that of the first. The new claim that the 1995 revocation was improper does not address or affect the propriety of the revocation now under consideration. We consider the facts of the 1995 petition only insofar as they are material to the 1997 petition. The present proceeding does not concern the actual revocation of the approval of the 1995 petition, and therefore this proceeding is not a proper forum to debate the merits or legality of that revocation. Of concern here is the evidence submitted with the 1995 petition, rather than the outcome or disposition of that petition. The 1995 petition is relevant because it provides a *contemporaneous* picture of what the beneficiary was doing (or what the petitioner claimed the beneficiary was doing) at the outset of the two-year qualifying period immediately prior to the filing of the 1997 petition.

Counsel states: "The instant petition was filed by the petitioner because it wanted to have the services of the beneficiary as a religious worker and not as a Buddhist Monk." In this respect, counsel's October 2004 brief adds little to the discussion already set forth in the AAO's February 1, 2005 dismissal notice. We need not

repeat said discussion at length here. Instead, we shall simply reiterate that, when considering whether the petitioner was performing the duties of a non-ministerial religious occupation from July 1995 to July 1997, we are entirely justified in considering the petitioner's own statements, made directly to the immigration authorities in August 1995, that repeatedly refer to the petitioner as a "monk," and the petitioner's reference to its "urgent need for [the beneficiary's] services as a minister."

Counsel asserts that counsel's occasional references to the beneficiary as a "monk," and use of the beneficiary's monastic titles, are not evidence "that the beneficiary is really masquerading as a Buddhist Monk." By limiting this argument to counsel's own assertions, counsel fails to account for the beneficiary's own tendency to sign his own name using titles which religious authorities have stripped from him. The AAO discussed this matter in its February 2005 order, and the newly-incorporated October 2004 brief adds little of substance to the discussion.

Counsel draws the AAO's attention to a recent opinion issued by the United States Court of Appeals for the Second Circuit, *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004). In that opinion, the court in *Firstland* interpreted the third and fourth sentence of section 205 of the Act, 8 U.S.C. § 1155 (2003), to render the revocation of an approved immigrant petition ineffective where the beneficiary of the petition did not receive notice of the revocation before beginning his journey to the United States. *Firstland*, 377 F.3d at 130. Counsel states: "If this decision becomes the law of the land, the decision to revoke the petition in the instant case will have to be vacated as a matter of law."

The present proceeding did not arise in the Second Circuit, and therefore *Firstland* was never a binding precedent for this case (as counsel's tentative language seems to acknowledge). Even as a merely persuasive precedent, moreover, *Firstland* is no longer good law.

On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). *See* Pub. L. No. 108-458, 118 Stat. 3638 (2004). Specifically relating to this matter, section 5304(c) of Public Law 108-458 amends section 205 of the Act by striking "Attorney General" and inserting "Secretary of Homeland Security" and by striking the final two sentences. Section 205 of the Act now reads:

> The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

Furthermore, section 5304(d) of Public Law 108-458 provides that the amendment made by section 5304(c) took effect on the date of enactment and that the amended version of section 205 applies to revocations under section 205 of the Act made before, on, or after such date. Accordingly, the amended statute specifically applies to the present matter and counsel's *Firstland* argument no longer has merit.

On April 6, 2005, based on the receipt of the October 2004 brief, the AAO reopened the proceeding and allowed the petitioner 30 days in which to supplement the record. The petitioner has submitted a final brief, which we shall now discuss. Much of counsel's 2005 brief consists of a chronology of events leading to the present circumstances.

Counsel states:

> The AAO stated that the petitioner had been properly served with a Notice of Intent to Revoke the petition. However, a review of the Notice indicates that the CSC [California

> Service Center] proposed to revoke the petition because the beneficiary was not qualified to perform services as a member of the clergy while the petition never mentioned anything about clergy-type duties. There is a question, therefore, whether proper notice was given.

The AAO indicated that the petitioner received "proper" notice in the sense that the director adhered to proper procedure by issuing a notice of intent to revoke, as required by 8 C.F.R. § 205.2(b). Counsel does not claim that the director failed to issue, or that the petitioner did not receive, the notice. Rather, counsel asserts that the notice was not "proper" because counsel disputes the grounds stated therein. The fact that counsel contests the grounds specified in that notice does not, by any means, demonstrate that the petitioner never received "proper notice" of the director's intent to revoke the approval of the petition. Indeed, the fundamental purpose of the notice of intent to revoke is to provide the petitioner the opportunity to contest or rebut the grounds set forth in that notice. In terms of due process, we reaffirm our finding that the director properly served the petitioner with a notice of intent to revoke.

Counsel states:

> [T]here are some prior judicial proceedings in the Immigration Court that should be noticed. The government participated in these proceedings and had a full and fair opportunity to litigate its position. Since the time for appeal has passed, the government is bound by the decision of the Immigration Judge under the principles of res judicata.[1] As set out in the monastery's response to the CSC's original Notice of Intent to Revoke, Immigration Judge Rico J. Bartolomei issued a decision granting the beneficiary's application for asylum and withholding of deportation. . . . [T]he Immigration Judge concluded that the activities of the Supreme Monks Council and the Thai government directed against the beneficiary were political in nature and substantiated their intent to "persecute the respondent [beneficiary][2] for his political opinions. . . ." Since the government chose not to pursue an appeal of the Immigration Judge's decision, it is bound by the decision.

(Citation omitted.) The present proceeding is not intended to strip the beneficiary of his asylee status. Rather, the present proceeding centers on discrepancies between claims made by the petitioner in 1995, and claims made by the petitioner two years later with respect to what the beneficiary was allegedly doing in 1995. The approval of the beneficiary's asylum application does not change that, although it does provide an obvious alternative avenue toward permanent resident status that the beneficiary has, for whatever reason, evidently chosen not to pursue.

We note counsel's earlier assertion that "the 1995 petition . . . is completely separate and apart from the petition at issue here. It has no relevance to the present petition, and the contents of that petition are not of record in the present proceedings." Counsel does not explain why judicial asylum proceedings are relevant to the matter at hand, but not a prior petition in which the petitioner had sought exactly the same classification for the beneficiary that it now seeks in the present proceeding.

Counsel states: "The fact that the beneficiary may have been a clergy-member Monk for part of the [two-year qualifying period] and not a clergyman for the balance of the time does nothing to discredit the fact that he was engaged in religious instruction for more than the two-year period required by the regulations."

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[1] Counsel does not explain why this same principle should not apply to the 1996 revocation of the 1995 petition, for which the time for appeal expired over nine years ago.

[2] Counsel's note.

The regulations at 8 C.F.R. §§ 204.5(m)(1) and (3)(ii)(A) require that the beneficiary must have carried on *the* vocation or occupation, rather than *a* vocation or occupation, indicating that the work performed during the qualifying period should be substantially similar to the intended future religious work. The underlying statute, at section 101(a)(27)(C)(iii), requires that the alien "has been carrying on such . . . work" throughout the qualifying period. An alien who seeks to work in a religious occupation has not been carrying on "such work" if employed in a religious vocation (with or without the denomination's authorization) for all or part of the preceding two years.

Counsel states that the director found the beneficiary to be "unqualified for clergy/Monk-type duties, but the petitioner never claimed that he was going to be engaged in such duties." This claim is simply false. As stated in the AAO's previous decision:

> In sworn affidavits accompanying [the 1995] petition, Venerable Prasert Phiujee, abbot of the petitioning monastery, repeatedly referred to the beneficiary as a "minister," "ordained monk" and "Buddhist monk"; called him by his religious name; and used the monastic title "Phra." . . .
>
> [A]t that time, an official of the petitioning monastery urged quick approval of the petition because of the petitioner's "urgent need for his services as a minister" to handle upcoming holiday ceremonies.

The fact that the petitioner made these statements in the context of an earlier I-360 petition does not mean that the petitioner "never" made such claims, as counsel now alleges. Section 204(b) of the Act, 8 U.S.C. § 1154(b), provides for the approval of immigrant petitions only upon a determination that "the facts stated in the petition are true." False, contradictory, or unverifiable claims inherently prevent a finding that the petitioner's claims are true.

For the reasons discussed above, we once again affirm the revocation of the approval of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The revocation is affirmed.